THE SPINNEY, HIGH ROAD, ESSENDON,

HERTFORDSHIRE

O P I N I O N

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1. I am instructed to advise Lime Interiors (Lime) with respect to two grounds of objection being expressed by the relevant officer of Welwyn Hatfield Council in relation to its assessment of an application made by Lime for planning permission "for the demolition of the existing buildings and construction of two architect designed dwellinghouses" at the above site.

2. The site comprises an area of land of about 2 acres in extent within the designated Green Belt on which is located a substantial dwelling with its ancillary buildings and large, well treed and planted garden. The site is located to the south of the village of Essendon which is described as “a small village, with a local primary school and pub amongst other facilities. The site is well integrated with the village…”. It lies on the opposite side of the road from other mature residential development.

3. The combination of a prior approval dated 21 July 2015 and made under class A(g) Part I Schedule 2 of the Town and Country planning (General Permitted Development) Order 2015 and a certificate of lawful development dated 2 June 2015 provide for a substantial enlargement of the existing dwellinghouse, including, for example a basement floor, a two storey rear extension and the erection of extensions on each side of the house together with extensive outbuildings including a pool room.

4. These authorisations provide what is termed a "fall-back" position for Lime. It is well established law that a fall-back is a material consideration to which the decision maker may attach significant weight as it is development that is likely to occur should permission be refused for the proposals the subject matter of the application. There is no doubt about their status as a genuine fall-back as work has been undertaken to commence the foundations for the work and advice taken as to their viability.

5. I describe this as well established law in light of the following passage from the Encyclopedia of Town and Country Planning (P.70.1) which accurately summarises the cases:

> The planning authority are entitled and indeed obliged to have regard to the "fall-back" position i.e. what the applicant could do without any fresh planning permission: see *Small Pressure Castings Ltd v Secretary of State for the Environment (No. 1) (1972) 223 E.G. 1099*; *Snowden v Secretary of State for the Environment [1980] J.P.L. 749*; *Burge v Secretary of State for the Environment* [1988] J.P.L. 497; *New Forest District Council v Secretary of State for the Environment (1996) 71 P. & C.R. 189* and *Brentwood Borough Council v Secretary of State [1996] 72 P. & C.R. 61*, cited in *R. v Secretary of State for the Environment Ex p. Ahern [1998] Env. L.R. 189; [1998] J.P.L. 351* (Christopher Lockhart-Mummery Q.C. sitting as a Deputy High Court Judge, p.9).
> In the latter case, counsel for the applicant (Charles George Q.C.) derived three propositions for tests from the above cases which, he submitted, it was necessary for the decision maker to apply, and the court proceeded to asses the lawfulness of the inspector's decision letter in that case by reference to those tests. They were: (1) whether there is a fall back use, that is to say whether there is a lawful ability to undertake such a use; (2) whether there is a likelihood or real prospect of such a use occurring; and (3) if the answer to the second question is "yes", a comparison must be made between the proposed development and the fall back use.

6. Despite the clear injunction in the authorities to the effect that the planning authority are **obliged** to consider the fall-back position I can find no recognition of that duty in the draft report sent to my clients appraising the application. As we shall see this displays a fundamental error in approach by the council.

Green Belt Issues

7. The officer has indicated to Lime that the provision of the additional unit on the site would substantially increase "the physical permanence of the site and, though vegetation may screen elements of the development, this proposal would still erode the sense of openness from certain vantage points along the access road...as such it is considered that the proposal would result in a significant increase in built permanence at the site and would erode the visual sense of openness, when compared to existing development".

8. This objection is phrased in somewhat opaque language. The concept of physical permanence is hardly relevant when comparing forms of residential development as all forms have an equivalent degree of permanence. I shall proceed that from the basis that, in reality, the objection relates to the issue of openness, the maintenance of which is a fundamental objective of GB policy. Thus the objection is two-fold: first, that there would be an increase in built form on the site and second, there would be a loss of openness or what is described as "the sense of openness".

9. Green Belt policy is set out in the NPPF section 9 paragraphs 79 to 93. Of particular relevance is the familiar advice with respect to inappropriate development and the very special circumstances test [VSC] set in paragraphs 87 and 88 as well as the definition of inappropriate development in paragraph 89 and in particular the last indent defining a particular exception, namely: “limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development”.

10. The Welwyn Hatfield Borough Council Local Plan (2005) predates the NPPF. As such the policies in the Local Plan (2005) are out of conformity and out of

date. Therefore the National Planning Policy Framework supersedes these policies and is a material consideration of significant weight.

(a) Appropriate Development

10. It follows that the first question that arises is whether the proposal constitutes not inappropriate development in that it falls within the exception identified in the sixth indent to paragraph 89 as set out above.

11. Previously developed land is defined within the Glossary to the NPPF as: "Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built up areas such as private residential garden parks, recreation grounds and allotments; and land that was previously developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time."

12. It has recently been confirmed that the definition of previously developed land includes the redevelopment of garden land outside the built up area: Dartford Borough Council v. SDCLG [2016] EWHC 220 (Mr Charles George QC sitting as a Deputy Judge of the High Court):
"It is impossible to read the definition of previously-developed land in the two Policy documents in such a way as to exclude from it private residential gardens which are not in built-up areas. To do so is to contradict the clear words used in the definition."

13. The issue whether the proposal is for the redevelopment of the curtilage of the existing dwelling is a mixed question of fact and law. An advice note prepared

by Ms Nicola Gooch of Thomas Eggar was submitted with the application that dealt with this question. I have reviewed this note and can confirm that it provides an accurate assessment of the matter and I concur with her conclusions. In particular, I agree that it would be difficult to conclude that the curtilage of the existing dwelling did not include the garden that relates to and in which the house is set.

14. However, having regard to the restricted area on which the two houses in the current proposal are located this dispute no longer arises as they are clearly located within any sensible definition of the curtilage of the existing dwelling and are thus within the area to be appropriately considered as previously developed land. It appears that this is now accepted by the council as the draft report included within my instructions refers to the site as previously developed land.

15. That takes us to the second part of the paragraph 89 insert 6 test relating to the effect on openness. The policy requires the comparison to be made with the existing development. Where, as here, the existing development has the benefit of a fall-back which is in the process of implementation and thus can be given maximum weight, the existing is the fall-back. To do otherwise and compare the proposed with the existing but un-extended dwelling would be to carry out an arid, theoretical, exercise unrelated to the objective of the policy. It would be absurd to ignore the fall-back when making such an analysis as to do so would risk the developer being obliged to implement the fall-back because the less harmful proposal has been refused permission as a result of an adverse comparison with the existing development before the implementation of the fall-back. That would be to turn the established and plainly common sense principles as to fall-back positions on their head.

16. Only such a literal and absurdist reading of the paragraph would restrict the comparison to the existing house before the work of extension was complete. Yet the officer's assessment appears to have ignored the fall back as the

comparison underlying the objection is with the existing and un-extended house. As I have concluded, this approach is wrong in law and contrary to the spirit and purpose of the fall-back principles. In my view, for the reasons set out above, any rational purposive construction of paragraph 89 would require the comparison to be made with the fall-back.

17. If that is done it is clear that the application proposals reduce the adverse effect on openness in comparison with the effect of the fall-back whether it is assessed in quantitative or qualitative terms, as to which see the helpful discussion of the concept of openness in the Planning Statement paragraph 52. The Planning Statement accompanying the application contains a table demonstrating that in terms of the conventional quantitative measures of effects on openness; that is area, floorspace and volume the fall back is more harmful than the proposal. There are substantial reductions in each measure: a loss of 130 m2 of floorspace (14%), a loss of 212 m2 (30%) of building footprint and a reduction in volume of built development of 300 m2 (10%).

18. As to qualitative issues, the Landscape and Visual Assessment Report submitted with the application describes the comparison in these terms in paragraph 8.2.2: "(the fall back would have) greater height, greater volume, greater .., greater visual mass in views through the site entrance". Further, the report reveals that the proposals would cause a "net increase on the site in terms of vegetation" via the increase planting of trees and shrubs (paragraph 9.3.3) which in turn would produce ecological benefits.

19. Accordingly, on this analysis the proposals are for appropriate development in the GB. As such, they are proposals for sustainable development that comply with the development plan that should be granted permission without delay, in compliance with NPPF paragraph 14, unless there is some real and substantial objection on grounds other than GB policy to the proposals.

(b) Very Special Circumstances

20. However, if for any reason the above analysis of paragraph 89 was defective so that there was an adverse finding on appropriateness under the paragraph 89 test, this would not necessarily lead to the refusal of the planning application but such application would then have to surmount the hurdle of demonstrating "very special circumstances" in order to obtain permission. See NPPF paragraph 87 and Fordent Holdings Ltd v Secretary of State [2014] 2 P & CR 12 at paragraph 28.

21. Residential development falling outside of the paragraph 89 test would constitute inappropriate development within the GB so the issue is whether there are any very special circumstances which outweigh any harm caused by reason of inappropriateness and any other harm.

22. The following propositions with respect to the scope of the concepts of any other harm and very special circumstances are well established[1]:

    i. "Any other harm" is not limited to harm to the green belt but includes all other harm caused by the development under consideration":

    ii. "The categories of what constitutes very special circumstances are not closed"[2].

    iii. To arrive at a conclusion that very special circumstances exist in accordance with paragraph 88 of the NPPF the decision maker must weigh the "other considerations" against the combined harm which is caused to the green belt by reason of inappropriateness, and any other harm (which may include but is not limited to other harm to the green belt).

    iv. "… in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any

[1] See the approval by the Court of Appeal in Wychavon DC v. SoS [2009] 1 P&CR 15 (Carnwath LJ) of the propositions of Sullivan J in R(Basildon DC) v. SOS [2004] and Doncaster MBC v. SOSE [2002] JPL 1509 at para 70.

[2] Per HHJ Pelling QC Fordent supra at paragraph 26.

particular combination amounts to very special circumstances for the purposes of PPG2 will be a matter for the planning judgment of the decision-taker."

v. "Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the *further* harm, albeit limited, caused to the openness and purpose of the Green Belt was *clearly* outweighed by the benefit to the appellant's family and particularly to the children so as to amount to *very* special circumstances justifying an exception to Green Belt policy" (original emphases).

23. There are three incontrovertible matters here which provide the foundation of the VSC in this case. First, the fact of the existing development on site, which is itself inappropriate. Second, the fall-back, namely, the ability of the site owner to increase the built form on site via the two authorisations identified above. Third, the reduction in openness referred to above by reference to the standard metrics of area, floorspace and volume. These three factors alone constitute a clear case of very special circumstances. As such they would clearly outweigh the harm from inappropriateness since the proposals are beneficial to this principal object of GB policy and are not alleged to give rise to any other GB harm.

24. I should make it plain that the factors constituting VSC do not end with the three key factors set out above. They would include the aesthetic or design benefits arising from the provision of the architect designed proposals in the place of the fall-back and the landscape and visual benefits that result from that same comparison. Additionally, for example, there is the social and economic sustainability arising from making more efficient use of the site for the provision of housing than the fall-back. Another factor would be the fact that the proposal is making use of previously developed land is another factor which in combination could be regarded as constituting VSC.

25. I have already explained the fundamental flaw with the objection raised by the officer on GB policy grounds. However, even on his analysis on paragraph 89 it would still be necessary to consider the application by reference to the VSC test and as I demonstrate above that must include a comparison with the fall-back in this case so that the result inevitable will be beneficial to the application.

(c) Urban Regeneration

26. The officer has indicated that he considers the proposals to conflict with the fifth purpose of the GB as set out in paragraph 80 of the NPPF: "to assist urban regeneration, by encouraging the recycling of derelict and other urban land".

27. Necessarily the proposals are not for the recycling etc of urban land. But that does not mean that their quality as appropriate development, if that is the conclusion reached by use of the paragraph 89 test, or the existence of VSC under paragraphs 87 and 88 are vitiated or outweighed. The best that can be said for this objection is that there will be two houses where there would be one very large one on the implementation of the fall-back. How that can be said in any cogent or material sense to affect the need to give priority to the use of recycling urban land I do not know. It must be the case that in the south east of England that unsatisfied housing demand is on such a scale that it cannot be satisfied by the re-use of recycled urban land in any event. That is why development plans and planning decisions so frequently permit residential development by way of urban extensions and other Greenfield sites.

Sustainability

28. A separate head of harm alleged by the officer's assessment is the alleged lack of sustainability of the location of the site. This is a factor which, if it has substance, would go into the VSC balance against the proposals.

29. Although Essendon itself is washed-over by the green belt, and as such does not have specific village boundaries,The Spinney sits adjacent to the southern edge of the Essendon conservation area, and is approximately 230 metres to the south of the entrance signs to the village. Saved policy GBSP2, paragraph 4.13 in the Local Plan (2005) states Essendon is classed as a rural village that contains a number of facilities and services which allows a degree of self-sufficiency to sustain its community. A pedestrian pavement links the site to the facilities within Essendon, and as such the site is well-integrated with the village.

30. The application is supported by a Transport Assessment [TA] prepared by JMP Consultants Ltd. This considers the proximity of the site to the facilities of the village and the local train and bus public transport facilities. It also identifies the fact that compared with the existing dwelling there will be an increase in traffic movements from the site of about 6 additional two-way trips per day.

31. The TA does not compare the proposal with the fall-back but since the fall-back is a much larger house than the existing the appropriate comparison would conclude that the appeal proposals would be likely to generate an even smaller net increase in vehicular traffic per day.

32. We are now in an area of planning judgment but the harm that could be said to arise from such insignificant traffic movements cannot on any sensible view take us into the category of significant harm required by the NPPF. It will be recalled that the penultimate core planning principle identified in paragraph 17 is to "actively manage **patterns of growth** to make fullest possible use of public transport, walking and cycling, and **focus significant development** in

locations which are or can be made sustainable" (my emphasis). The construction of an additional dwelling cannot sensibly be said to take us into the realms of managing patterns of growth or focusing significant development. It is wholly unrealistic to consider this factor could outweigh all the beneficial effects on openness and visual and landscape amenity that would flow from the implementation of the proposals.

33. As to the other elements of sustainability there are local facilities within the village, including a pub and a primary school. As a result Essendon has some but not all facilities required for every-day living and the sustainability of the application site does not materially differ from the rest of the settlement as a generality.

34. In terms of public transport, the nearest rail station is a short drive away and the local bus service, albeit infrequent, has a stop within walking distance of the appeal site.

35. As to these elements of sustainability similar issues arise as to the insignificant scale of harm as have already been identified with respect to transport sustainability discussed above.

Conclusion

36. I have set out above the circumstances in which it could be found that the proposals constitute appropriate development in the GB by reference to the test imposed by paragraph 89 NPPF. In my view, therefore, the proposals would comply with the NPPF subject only to the sustainability point which can attract little, if any, weight in the light of the above analysis. In these circumstances the proposals would be sustainable development in NPPF terms and justify the grant of planning permission.

37. If a contrary view is taken under paragraph 89 it would be necessary then to test the proposals under the VSC test of paragraphs 87 and 88. Here the

fall-back provides a very substantial platform to establish and pass that test given the conclusion can only be that the proposals would improve the openness of the GB and thus accord with the underlying objectives of GB policy. As a result this also provides very strong reasons to grant permission to the application proposals.

38. To the extent that the officer is making the comparison with the existing dwelling without taking account of the fall-back he has fallen into manifest error having regard to the existence of the fall-back.

39. In my opinion, this is an extremely strong case and should planning permission be refused for the reasons currently being advanced by the local planning authority I would advise my clients to take the matter on appeal to the Secretary of State and to make an application for their costs to be paid by the council for its failure to consider the matter in accordance with well established principles of law.

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